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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-113

FORD MOTOR COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA

and

THE ELECTRIC AUTOLITE COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

REPLY BRIEF FOR FORD MOTOR COMPANY

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The Government's Brief and the Record on Appeal fail to reveal any actual or probable anticompetitive effect of the challenged acquisition. Within the uniquely and inherently stable structure of the spark plug market, competition was not diminished but increased. In seeking to sustain the judgment below, the Government argues in effect for a wholly new *per se* rule that would forbid a large purchaser from ever becoming its own supplier by acquisition. We submit that this case does not form a proper occasion for expansion of the existing inventory of *per see* rules.

Entirely apart from the violation found, there is no justification for the novel, ineffective and anticompetitive relief granted below.

ARGUMENT

I

The acquisition had no actual or probable adverse effect on competition.

The Government makes three arguments in support of the trial court's finding of a Section 7 violation. First, it contends that the acquisition foreclosed an important share of a market by effecting a "more permanent" tie. Second, it advances the novel theory that Ford's mere existence as a purchaser of spark plugs caused a moderating effect on aftermarket prices and that, therefore, loss of Ford's customer status was illegal. Third, it seeks to minimize the important procompetitive effects of the acquisition and dismisses them as not appropriate for judicial consideration.

The Government ignores basic facts and effects, and sometimes misconceives them, so that a reiteration of certain fundamentals becomes necessary.

(1) Historically there have been only three major manufacturers of spark plugs. (See App. 546a-550a and Govt. Brief, pp. 23, 40.) Economic patterns inherent in the market have not allowed for the growth of a fourth significant producer. (See Ford Brief, pp. 6-13.) These economic patterns dictate that any substantial manufacturer entering the market must do so by replacement of an existing producer, not by the creation of an additional one.

(2) Consumer demand is inflexible. The replacement market is necessarily limited to vehicles on the

road. Neither price competition nor any similar activity can expand the opportunities for sale. Most spark plug replacements are in connection with a tune-up, and the cost of the plugs is relatively small in relation to the cost of the tune-up. Therefore, the market is simply not sensitive to price. (See Ford Brief, pp. 37-38.) Ford attempted to compete through cutting prices; but its efforts in that regard were unsuccessful and Ford abandoned them. (App. 654a-55a, R. Tr. 370; App. 761a, FR-13.) Spark plug producers are obliged to compete largely by other means. (See note 2 at p. 5 *infra*.)

(3) At the time of the acquisition, Champion was the dominant plug producer. It was extremely profitable and held 50% of the market. It had been Ford's sole supplier for 50 years, and it sold OE plugs to Ford at the below-cost 6-cent price. Ford had no incentive to buy from any other firm. Even Champion's vice president admitted that it was really not in danger of losing the Ford business.[1]

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[1] In quoting testimony of Champion's vice president (p. 28), the Government's Brief substitutes asterisks for the following:

> "But, excluding the possibility of a price change, either up or down, we would just automatically continue to do business with Ford at the stipulated prices." (App. 24a, Tr. 694-95.)

On cross-examination, this same executive testified as follows:

> "Q. And isn't it true that you [Champion] would have been able to offer Ford more advantages as a supplier than some new company that might come along? Isn't that true?
> A. Very definitely.
> Q. So that, really, you were not in danger of losing the Ford Motor Company business to some other supplier during that time [the period of four to five years immediately prior to the acquisition], isn't that true?
> A. That is true." (App. 34a, Tr. 715.)

(footnote continued)

(4) The acquisition eliminated no competition. It foreclosed no market open to anyone but the dominant Champion. (See pp. 5-6 *infra*.) It did not eliminate Ford as an independent entrant, because Ford was not on the brink of entry. (App. 561a.) It did not remove a beneficial effect on aftermarket prices because Ford had none. (See pp. 7-8 *infra*.)

(5) The acquisition caused the first procompetitive change in the spark plug market in more than 25 years. The dominant Champion was replaced as supplier to Ford by the "indubitably" weaker Electric Autolite (App. 550a), which was the smallest of the only three companies capable of supplying Ford. The ultimate result was evidenced by a change in market percentages; a roll-back in the 80% share of the two dominant firms, including reduction of Champion's top-heavy 50% share. The result reflected much more than a change in percentages, which alone would have been a healthy contribution. It reflected the diligent and persistent efforts of Ford to increase the aftermarket sales of the weak Autolite brand, both through improvement in technology and development of market techniques that could compete

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Neither did other plug manufacturers believe that Champion could be unseated. A Bosch executive testified on cross-examination by Government counsel:

> "Q. Would you consider Ford a potential customer, today?
> A. I couldn't visualize that, no.
> Q. Well, is this a change from the pre-Autolite acquisition position of Ford as a possible purchaser of your company?
> A. No, I don't think so even before Autolite.
> Q. Why do you say that?
> A. Even before Autolite was taken over by Ford, we hardly had any chance even with this quotation [App. 493a, F-85]. I can say we were surprised that Ford was interested in getting a quotation. . . . [I]t was known that Ford had a supplier for spark plugs for many, many years.". (App. 204a-5a, Tr. 2252-53.)

with the sophisticated systems of General Motors and Champion.[2]

(6) The increased market share by the weakest of the three principal brands was clearly procompetitive. Champion, forced to a smaller base of OE sales, gained the incentive to compete more vigorously not only for aftermarket sales of Champion-branded plugs, but also for the sale of private brands. (See Govt. Brief, pp. 24, 40.) In addition, Ford enabled Electric Autolite (ELTRA) to remain as an independent producer of plugs by assuring it sufficient business to support a new facility. ELTRA is now an aggressive participant in the private brand market, without any support from Ford.

It is myopic to conclude that this market after the acquisition is less competitive than before.

The Theoretical Opportunity to Try

The court below recognized Champion's entrenched position as supplier to Ford for 50 years. It dismissed as im-

[2] The Government suggests that there was an effortless and automatic shifting of market percentages merely reflecting the extent to which Ford's OE needs exceed Chrysler's. There was no such shift. The inroads by Ford were hard-earned and gradual. (See App. 754a, FR-3.)

Ford initiated and improved upon numerous programs in order to improve the quality of the Autolite plug and to increase aftermarket sales. Among other things, it initiated technical assistance programs, increased quality control, undertook promotional campaigns, developed a national warehousing system, developed new wholesale outlets, and expanded all-make orientation. (App. 634a-52a, R. Tr. 282-346; App. 721a-27a, R. Tr. 838-58; App. 756a-57a, FR-10B, 10D.) In addition, Ford continued Electric Autolite's attempts at price competition, but like Electric Autolite, it did not succeed. (See pp. 2-3 *supra*.)

material a weighing of the probabilities as to whether some potential supplier might one day come up with a proposal so attractive as to entice Ford away from Champion. "What hurts," said the court, "is that the opportunity to try has been taken away." (App. 564a.) The opportunity to try in this context was a mere charade.

The Government would now expand the opportunity to try far beyond its proportions. It relies wholly on the fact that Ford's relationship with its new (and far weaker) supplier is theoretically "more permanent" than Ford's relationship with its former (the dominant) supplier. The Government proceeds to use synthetic percentages,[3] which measure no more than an artificial size of an opportunity that did not exist.

The Government relies on *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962), but the facts of that case have no resemblance to those at bar. *Brown Shoe* relates to foreclosure of smaller rivals actually supplying Kinney, the acquired firm. In *Brown Shoe*, the vertical arrangement created a clog on competition by blocking markets otherwise open to and supplied by existing rivals.

It is not so here. The dislodging of the dominant Champion from its 50-year relationship with Ford, in favor of the weakest rival capable of supplying Ford, increased competition. The finding of a violation on the basis of the disappearance of a purely theoretical opportunity is insupportable.

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[3] Ford's OE requirements in 1964 represented only 3.8% of the entire market. (App. 438a, G-115; Ex. G-161.) The Government's Brief refers to a percentage of "the OE market actually available to independent producers." (Govt. Brief, p. 26.) This synthetic market definition excludes sales in the entire aftermarket although aftermarket sales as of 1964 represented more than 85% of the entire market. (Ex. G-161.) Further, it excludes General Motors, which is one of the two dominant competitors in the aftermarket.

The Supposed Moderating Effect

The Government advances the novel theory that Ford's mere presence as a significant purchaser from Champion caused a moderating effect on aftermarket prices in the industry; and that Ford's loss of its customer status was therefore illegal. (Govt. Brief, pp. 36-38, 52).[4] The Government so concludes without regard to any likelihood of Ford's entry, the difficulties of entry, the 6-cent deterrent to entry, or the time lag necessary for successful entry;[5] and without

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[4] For decisional authority the Government cites *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158 (1964). (Govt. Brief, p. 37.) The Government quotes from *Penn-Olin* but omits key words from the very sentence it quotes. The Government Brief says:

> "[I]t was Ford's continuing presence 'at the edge of the market' that had a substantial influence on the competitive behavior of the existing producers. See *United States* v. *Penn-Olin Chemical Co., supra,* 378 U. S. at 173." (Govt. Brief, p. 37.)

In the partially quoted passage from *Penn-Olin* to which the Government cites, this Court had inquired whether a certain potential entrant might have remained "at the edge of the market, continually threatening to enter." The continual threat to enter was the critical point. *Penn-Olin* in no way involved the theory the Government now advances. Rather, in *Penn-Olin*, purchaser status was treated merely as one possible indicium of incentive to enter the market.

[5] In its Brief (p. 52) the Government makes clear that it is not relying on Ford's possible potential entry as a part of its theory. The Government says:

> "[The pro-competitive influence that Ford previously had on the spark plug market] was not, as Ford contends (Br. 33), 'premised on imminence of Ford's entry', but rather was based on the overall effect of its presence at the market's edge, as the industry's leading customer . . . ."

Elsewhere the Government relies on the fact that:

> "Ford's own witness testified that, prior to the acquisition, Ford was not on the point of becoming a manufacturer . . . ." (Govt. Brief, p. 51.)

any evidence that Ford moderated the aftermarket prices even of its own supplier.

The Government asserts that Ford as a customer moderated Champion's replacement prices. (Govt. Brief, pp. 13, 32-33.) But in all of the 6,000 pages of the record, it can point to no record support. (See Ford Brief, p. 23.) In fact, Ford did not have a moderating effect on aftermarket prices.[6] The 6-cent OE concession necessitated inflation of aftermarket prices in order to allow for recoupment of the significant OE loss. (See Ford Brief, p. 25.)

Moreover, to the extent Ford may have influenced Champion as its customer, Chrysler has now replaced Ford in this role.

The Substantial Procompetitive Effects of the Acquisition

The Government first seeks to minimize Ford's contributions to competition and then tries to discount them as a matter of law.

The contributions are substantial (see p. 9 *infra*), and the Government's legal argument is misplaced. The Government quotes a statement from *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963), regarding the Philadelphia Bank's argument that the merger should be

[6] The Government relies on excerpts from the testimony of a Champion officer that Champion's "insurance" against Ford's "going in the spark plug business" had been fifty years of below-cost OE prices. (App. 36a, Tr. 717-18; see Ford Brief, p. 24.) But the record is barren of evidence that aftermarket prices were lowered while Ford was Champion's customer. It affirmatively shows the contrary: Champion raised its aftermarket prices to Ford. In the year prior to the acquisition, the price paid by Ford for replacement plugs was the highest offered by a major plug manufacturer; and it increased from 36.6 cents in 1959 to 38.6 cents in 1960. Following the acquisition, when Ford was Champion's competitor and not its customer, Champion's price stayed the same or declined; and it did not rise above the 1961 level until 1969. (App. 761a, FR-13.)

allowed because "Philadelphia needs a bank larger than it now has in order to bring business to the area and stimulate its economic development." 374 U. S. at 371. This Court rejected the contention; for benefits to business development cannot properly be weighed against a substantial lessening of competition in the relevant market.

But *Philadelphia National Bank* has no application to the case at bar. The benefits to competition in this case are in the very market in which the violation was found. They could not properly be ignored, and yet they were ignored, while the trial court deferred to ephemeral potentialities.

The court below should have considered that, by the acquisition, a new competitor was created; that ELTRA, the new competitor, had the incentive to compete actively in the sale of private brands; that Champion was dislodged from a comfortable OE base, its near-monopoly share was diluted, and it too gained the incentive to increase competition in private brand sales;[7] that the Fostoria plant—a "potential albatross"—was preserved; and that the weak third producer became a vital third competitor competent to contend with the dominant General Motors and Champion.

These are the actual effects of the acquisition. They, and not illusory possibilities, are the considerations by which the court should have been guided.

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[7] The Government does not refute, and apparently accepts, the fact that Champion has an increased incentive to compete in private brand sales. (See Govt. Brief, p. 40.) It attempts to minimize the importance of ELTRA's contribution through its recognition that the market is essentially confined to three significant firms. (*Ibid.*)

II

The relief is ineffective, anticompetitive and confiscatory and should be revised.

The Government brushes off the extraordinary relief ordered as a routine and discretionary matter within the sole province of the district court. Relief is of course initially a matter for the district judge. But when relief ordered to cure a Section 7 violation would reduce actual competition, restrain potential competition, invite engrossment, and deprive the acquiring company of basic proprietary rights having no nexus with the acquisition challenged, the matter is not routine and the relief should be revised.

The Ineffectiveness of Divestiture

The Government's Brief sets forth as the object of divestiture the recreation of competitive pressures to supply Ford. (Govt. Brief, p. 44.) If such opportunities would actually arise, the principal beneficiaries would be General Motors and Champion, the only firms capable of supplying any significant part of Ford's plug requirements.

The fact is, however, that the hypothesized pressures never existed (see pp. 5-6 *supra*); and there is no probability that they ever will exist under the judgment of the trial court.

The judgment encourages the stable single-sourcing patterns that have been the hallmark of the spark plug market since the inception of the automotive industry. The 6-cent OE price—which is dependent upon the supplier's assurance of long-term replacement sales—and the long periods necessary to qualify spark plugs and to develop brand acceptance in the aftermarket, all prohibit the flexible sourcing patterns that the Government envisions.

While the judgment is ostensibly predicated upon the creation of New Fostoria as an "independent" firm, it insures that New Fostoria will never be "independent." The extraordinary and oppressive ancillary injunctions (see pp. 12-15 *infra*) doubly ensure and virtually concede that this will be so.

The probable result of the judgment will be New Fostoria's complete dependence on Ford. New Fostoria cannot survive unless Autolite remains as original equipment on Ford vehicles. (See Ford Brief, pp. 36-37.) The dependence of New Fostoria on Ford will be far greater than was Champion's dependence on Ford. New Fostoria will be a very weak third spark plug maker. It will be a neophyte firm among giant companies with established systems for national distribution. Its fixed volume facility requires a large OE buyer. It could not hope to dislodge the dominant Champion from Chrysler and will be obliged to depend totally on Ford.

Thus, at best, the judgment of the trial court would reinforce the historical pattern of three major producers, each dependent upon a major automobile manufacturer. At worst, the new firm will fail, and divestiture will herald engrossment by General Motors and Champion. Inevitably, Ford's displacement by a neophyte firm will expose the vacated share of the market to encroachment by the dominant companies.

Divestiture in this case holds no prospects for enhancing competition.[8]

[8] If relief is to be required, then surely relief sensitive to the inherent structure of the market should be devised. In contrast to the trial court's attempt to impose forms of relief not adaptable to the special structure of this industry, the relief proposed to the trial court by Ford (see Ford Brief, p. 50) would create actual increased competition. For ten years, Ford would commit to buy 30 million plugs per year from ELTRA, if ELTRA should desire to sell those plugs

The Impropriety of the Injunctions

The court below imposed unprecedented ancillary restraints. It would bar Ford's internal expansion into spark plug manufacture for ten years. It would deprive Ford, for five years, of its basic proprietary right to use its own name on its plugs. It would require Ford to purchase half its plug requirements for five years from New Fostoria, under the Autolite name.

The restraints are clearly anticompetitive in themselves and seriously impede the ordinary forces of competition. If these restraints could be justified at all, they must be proved essential to a plan that would restore competition. But the Government has failed in its attempt to prove their necessity.

Particularly is this so with respect to the unprecedented[9] 10-year injunction against internal entry, and the 5-year

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to Ford. The commitment would support ELTRA's effort to add capacity to its now minor facility. If ELTRA should desire to utilize its added capacity to develop the business of other customers, Ford's incremental requirements could be served by other small producers, who would actually have the opportunity to compete for the business. At end of the ten years, Ford would be faced with the decision whether to expand its own facilities or to purchase its incremental requirements from other producers. Its potential expansion would have the effect of potential entry, and would cause procompetitive pressures on producers to keep prices low and quality high. Meanwhile, Ford would again be a customer, and ELTRA would evolve as a fourth significant producer.

[9] Neither Appellant nor the Government has found any basis in any litigated case for restraints against internal entry, or restraints against the use of one's name where the name was not used to confuse or deceive. The Government urges that innovation is necessary to satisfy the exigencies of this case. It cites *International Boxing Club of New York* v. *United States*, 358 U. S. 242, 253-62 (1959), and *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185-90 (1944). (Govt. Brief p. 53, n. 29.) Neither is precedent for adopting innovative relief. The only remedies involved in those cases were traditional ones.

confiscation of Ford's right to use its own name on its plugs.[10]

The Government's attempted justification for the injunction against entry is itself an admission that the restraint is surplus. The Government said: "Ford was not on the point of becoming a plug manufacturer," and moreover "a period of about five to eight years" lead time would in any event be necessary for Ford's significant entry. (Govt. Brief, p. 51.) Thus, there is built-in insulation for the new firm, and there is no need whatsoever for depriving Ford or the market of the benefits of Ford's right of entry.[11]

The Government implicitly suggests that the ten-year ban against entry is a penalty. Ford has manufactured

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[10] The requirements provision, too, is unreasonable, oppressive and restrictive of competition. It decrees who shall be Ford's supplier and it thus removes the competitive pressures that would otherwise determine this result. However, even if divestiture were appropriate, and even if it required the support of ancillary restraints, then clearly the requirements provision would be ample support and the more extraordinary restraints would be excessive. As the necessary result of the requirements provision, Ford could not manufacture one-half of the plugs that it needs and thus would be discouraged from manufacturing at all. Also, Ford would be required to use New Fostoria's Autolite name to the extent of one-half of its needs, it would necessarily be precluded from using its own name for one-half of its needs, and the enforced use of the Autolite name would assure the exposure of the new firm's brand name. If divestiture can be effective at all, then surely divestiture as supported by the requirements provision is enough.

[11] The Government does not controvert the inherent anticompetitive aspects of an injunction against entry. With some inconsistency, it urges that Ford's hypothesized moderating influence was not " 'premised on imminence of Ford's entry', but rather was based on the overall effect of its presence at the market's edge, as the industry's leading customer." (Govt. Brief, p. 52.)

Constraining Ford to the role of a perpetual customer is not a proper objective in this case. Indeed, if Ford were required to be a perpetual customer, the possibility of its moderating effect through pressures of potential entry would be totally destroyed. But even if fettering Ford to being a customer were the objective of the Court, then the object would be amply fulfilled by the judgmental provision requiring Ford to purchase half its requirements from New Fostoria under the Autolite name for five years.

spark plugs for ten years, the Government says, and therefore for ten years it should be required not to manufacture them. (Govt. Brief, p. 52.) But "Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 326 (1961).

Nor does the Government show any necessity for the 5-year confiscation of Ford's right to use its own name on its plugs. It argues that the new company will be "seriously handicapped" unless it supplies plugs to Ford under the new company's own trade name. Yet the judgment would require Ford to buy half its requirements from New Fostoria under New Fostoria's own label. The purpose of the restriction against Ford's use of its name is thus amply served by the requirements provision.[12]

Ford's right to its name and its right of entry are valuable basic rights, and Ford is entitled to them. It is no excuse, as the Government urges, that the bans are merely temporary, or that spark plugs alone are involved. The restrictions are not necessary. They are not restorative.[13] They

[12] As to the name restriction, too, the Government has no logical answer to Appellant's presentation of the anticompetitive effects. As Appellant pointed out (see Ford Brief, pp. 44-45), among other things the restriction encourages Ford to withdraw from the aftermarket. If Ford does so, its needs will be drastically reduced, the support that it would otherwise give to New Fostoria will be minimized, and engrossment by the dominant firms will be invited.

The Government's only arguments are that (1) the judgment does not require Ford to withdraw and (2) if Ford withdraws, New Fostoria can pick up Ford's Autolite accounts. The latter supposition is misplaced. If Ford discontinues Autolite as its OE brand, there will be no significant aftermarket demand for Autolite plugs, and there will be no incentive for distributors to stock them.

[13] The Government claims that the injunctions will merely restore conditions to the way they were before the acquisition. This is not so. Ford, like all of its competitors, always had the right of internal entry; it always had the right to use its name; and it always had the right to choose its suppliers. The rights are basic to Ford and to competition, and Ford should not be required to relinquish them.

are anticompetitive. They are uniquely oppressive, and they should not be allowed to stand.

Zenith Vinyl Fabrics Corporation ("Zenith") is the plaintiff in an unrelated action pending against Ford. In that other case, Zenith alleges that Ford improperly terminated a contract for Zenith's distribution of vinyl fabrics. Zenith has been granted leave to file a brief amicus curiae herein. Zenith's brief amicus curiae asserts that the challenged acquisition injured Zenith as a distributor of vinyl fabrics.

Neither the complaint in this case (App. 3a-10a), nor the court below, nor any party on appeal, has raised or explored any issue regarding vinyl fabrics. The issues now sought to be tendered by Zenith are not properly before this Court.[14]

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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[14] See *Knetsch* v. *United States*, 364 U. S. 361, 370 (1961), wherein the Court found "no reason to pass upon" an argument that had "never been advanced by petitioners."